Division VI Legal Responsibility and Liability
Chapter VI-1 Legal Responsibility

VI-1-1 Introduction

Transportation safety is the comprehensive pursuit of often competing needs between the highway environment, the vehicle, and the road user. A full understanding of these needs requires a comprehensive knowledge of safety that few have acquired.

Often, designer, operators, planners, and advocates of safety view the ultimate solution from very different points of view. I.e. a solution that is safe for one mode of transportation may not translate into increased safety for another.

It has been suggested that motor vehicle safety efforts can be characterized into three distinct historic periods (Glennon, 1996). These periods are the Campaign Era, the Action Era, and the Priority Era.

Glennon suggests that the *Campaign Era* prior to the 1960s was characterized by public information efforts that focused on particular aspects of safety that often aimed at improving driver behavior in order to improve safety. Some of the campaigns included "Stop, Look and Listen," "The Life You Save May Be Your Own," and speed skills. Today, safety campaigns continue with varying levels of success.

This time frame also saw a great increase in the amount of new roads being built. These new roads were often built to the highest level of safety for the vehicle. In order to achieve these high levels, designers began to adopt "standards" for use in highway design. Engineering judgment was deemed less important as the need to construct highways efficiently and in a consistent manner became paramount.

Since the 1960s, a great deal of emphasis was placed on providing a clear roadside to lessen the frequency and severity of the impacts between road users and fixed objects. This was a dramatic shift from the 1950s, when the prevailing attitude was that any driver who left the road and ran into a tree or sign deserved the consequences of their actions.

As the growth of freeway construction increased in the 1960s new opportunities for improved highway design became evident to the public agencies and road users. In response, the 1966 National Highway Safety Act was passed by congress. This act adopted 16 highway safety standards. The Highway Safety Act marked the beginning of the *Action Era.* Money was allocated not only to standards, but also to enforcement, education, and emergency medical services. In addition, data systems and research also increased in importance in the effort to improve safety. It quickly became clear that not enough money was available to pursue all elements of safety.

According to Glennon, this fact ushered in the *Priority Era*. The *Priority Era* required transportation officials to target money to areas with the highest return on the safety dollars spent. As such, the high level of return

for highway safety standards became first and foremost in a transportation agency's attack on the "safety problem."

Therefore, to improve safety, focus must be on the reduction and prevention of accident occurrences and the reduction in severity of those accidents once they occur. The approach should also support the fact that safety is not just a roadway or highway issue. Safety also encompasses consideration and provision for human factors; the different vehicles using the facility; the driving task; and interaction between the road users.

Safety is a product of the complex interaction amongst many variables. Consequently what is commonly a safety related issue in the urban environment is not always an issue in the rural environment. Traffic mix is also an important part of the safety equation, as trucks, cars, buses, bicycles and pedestrians must all exist in the same highway prism.

Statistics show that three severe injury collision types are prominent in the urban environment: rearends, fixed object, and entering at angle collisions. In the rural highway environment, fixed object, overturn, and rearend accidents dominate.

VI-1-2 Legal Liability

Legal liability has become an increasingly important aspect for many transportation agencies to consider. A number of factors contributed to this phenomenon. Laws enacted by the Washington State Legislature (RCW 4.92.090) in the early 1960s ended the concept of sovereign immunity. Under sovereign immunity the state was immune from tort suit and liability. With the loss of this immunity, transportation agencies have become increasingly sensitive to reducing risk of liability exposure whenever possible since significant expenditures and resources were required to defend and settle disputes. The burden of tort liability eroded the ability for the engineer to make reasonable engineering judgments for fear of being questioned in the court of law. This heightened awareness to liability exposure by engineers led to training and manuals that left little flexibility within the standards or when deviating from standards.

The concept of flexibility in highway design is therefore met with an understandably cautious mindset. Placed before many agencies is anecdotal evidence of the benefits of one design treatment over another, but little evidence beyond accepted standards research is available to persuade the design professional to vary from the commonly accepted design standards or practice. Thus the designer is often placed into the box of the obstructionist or at times the advocate of a standard or mode of travel. Unfortunately, these stances are commonly not looked upon with great admiration by the public or parties who are in disagreement. In reality, the common bond between the two parties is the issue of tradeoffs and the optimization of those tradeoffs. In the debate and discussion aimed at optimizing alternatives, an underlying fear of tort liability often arises. Most practitioners understand little as it relates to the basic principle of tort liability and how this knowledge can and does impact design flexibility. This chapter is intended to provide additional information regarding torts,

and to present items that should be considered in any design, including its impacts on tort liability.

VI-1-3 Tort Liability

The term tort law is based on the concept that when a person suffers personal injury or property damages, they may shift some of the responsibility for that damage to another entity. Compensation for that responsibility is often addressed through monetary damages being placed on those who breach the duty imposed by law. Thus in the case of a roadway agency, the duty exists to maintain and operate the roadways in a condition which does not expose the motorist to undue hazard. In cases where the hazard cannot be removed, the agency may have a duty to warn of these hazards.

Where an agency fails to exercise reasonable care in the design, construction, maintenance, or operations, liability may exist. Liability placed against the department generally result from not following a nationally accepted guideline or manual. The Manual on Uniform Traffic Control Devices or AASHTO Policy on Geometric Design of Highways and Streets and the WSDOT manuals and guidelines are common examples. Further, these policies are often interpreted by the plaintiff's expert and can vary greatly from what customarily is accepted within the department or agency. These interpretations, should a judge accept them as an issue of fact, are often enough to bring a case to trial or settlement.

The civil court process is initiated when the plaintiff files a claim that alleges that the agency failed in their duty to exercise reasonable care. Once a claim is filed a suit may follow in which the case will receive judgment in front of a judge or jury. Often prior to trial, summary judgment motions are filed. Summary judgment motions are procedural devices used to resolve claims quickly and without trial. These motions are often filed when either material fact or conclusions drawn from facts is undisputed, or where only a question of law exists. Summary judgments may be made to all or part of the claims. Issues of law arise when only one conclusion can be drawn and where the evidence is not disputed. When evidence is disputed an issue of fact may exist. In essence, an issue of fact arises when a fact is maintained by one party and disputed by the others in pleadings. Judges in these cases are generally reluctant to issue summary judgment as an issue of law, particularly when a plaintiff's expert either rightly or wrongly suggested there is an issue of fact to be decided. This is clearly the case when the plaintiff's expert alleges a hazardous condition existed and can show either documentation or research that may allude to the issue, even though common practice shows otherwise. The jury or judge is left to determine whether the state owed a duty to the plaintiff to follow certain design standards, i.e.

a) Was there a breach of that duty, which fell below the standard of care expected from a reasonable person in a similar circumstance?

b) Was the failure to meet the standard of care the proximate cause of the injuries?

c) What are the damages to be awarded for failure to meet that standard of care?

VI-1-3-1 Negligence

In most circumstances alleged negligence against a transportation agency is unintentional negligence or tort. Liability arises from this type of negligent conduct since it is assumed that there is a duty owed by a transportation agency to design, construct, maintain and operate a road in a way that is reasonable and expected, and that this duty was breached. As defined, negligence is the failure to use care that would be expected of a reasonable, prudent, and careful individual under similar circumstances. The plaintiff in a tort often seeks to be compensated for the injuries that arise from the negligent act under the current economic and social climate. In Washington, negligence or fault is defined by RCW 4.22.015.

The standard required of the defendant is also required of the plaintiff. In some cases it can be concluded that the plaintiff failed to meet the standard of care required for an individual in the same circumstances. Take for instance the driver who speeds in icy conditions. In this incident the jury or judge may find that the excessive speeds contributed to the accident. Therefore, the failure to follow the legal standard of care required for ones own safety might be considered "contributory negligence." RCW 4.22.005 addresses this issue, and states that the contributory fault of the claimant proportionately diminishes the amount of compensation awarded, but does not bar recovery.

Take for example, a case where the jury awards a plaintiff $100,000 for injuries suffered. The jury also renders the opinion that the plaintiff is 60% at fault and the defendant is 40% at fault. In this example, the plaintiff would be awarded $40,000 from the defendant.

VI-1-3-2 Joint and Several Liability

In many cases there is more than one defendant. In these cases a defendant who is liable for any portion of a plaintiff's injury, is jointly and severally liable for all damages with the other defendants in the case who are held liable. This is defined by RCW 4.22.030. This simply means that, if a co-defendant cannot pay their share of liability then the other defendant must pay that share of the settlement -- even if this liability is minimal. For instance, assume that Defendant One, a driver of a vehicle, is speeding recklessly and is found to be 99% at fault in an accident that injures a faultless passenger, and Defendant Two is one percent at fault because of a minor design deviation or variance. Assume the jury issues a finding of $1,000,000 dollars to the plaintiff. Now Defendant One would be liable for $990,000 and Defendant Two for $10,000. However, in this particular case Defendant One has no insurance or ability to pay for the judgment. As such, Defendant Two would be jointly and severally responsible for the judgment. In other words, Defendant Two would be responsible for the entire $1,000,000 settlement. This is why plaintiffs will often join defendants in a case even though it is clear that little or no liability exists for one or more of the defendants. This is also known as suing the "deep pockets." In addition this is often why agencies will settle for large sums even though intuitively little fault is apparent. The risk of a minor amount

of liability being found is high when the plaintiff's expert is free to find fault of even the slightest amount as the reason for the accident to have occurred. A discussion of joint and several liability is found in RCW 4.22.070, including a discussion of the percentage of fault, the determination of fault, exceptions, and limitations.

VI-1-3-3 Discretionary Immunity

As the concept of sovereign immunity ended, state legislatures began restoring parts of immunity.

The philosophy behind the determination of a discretionary act begins with the separation of powers doctrine, which suggests that certain government policy making should not be subject to judicial review. However, both the state and federal legislative branches have been reluctant to define the term "discretionary function." As suggested, tort law is driven by the fundamentals of reasonableness, duty of care, and proximate cause. In this case proximate cause means that the act or omission played a substantial part of brining about the injury or damage; and that the damage was a direct result or probable consequence of the act or omission.

In part tort opinions attempt to find a balance between the rights of the parties and the interest of the public. Executive branches of government for the federal, state, and local systems, federal and state agencies, and the courts influence this balance.

It is not uncommon for a court to search for sources of the policy as it begins to contemplate its decisions. With the desire of cities, states, and the federal government to incorporate policies that allow for flexibility in design within the principle of CSD, it is contemplated that courts will strike a balance which will account for safety, mobility, aesthetics, and the environment when weighing the impacts of one element over another in determining the weight of a questioned tortuous action.

It would be critical, then, that any such flexibility in highway design policy decisions be crafted to meet the four-part test established by the Washington State Supreme Court in *Evangelical United Brethren Church of Adna v. State:*

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

VI-*1-3-4 Level of Decision Making in Discretionary Immunity*

Washington courts have limited the doctrine of discretionary immunity to high-level policy decisions that consciously weigh one policy alternative against another. The doctrine is not applied to lower level decisions, which

are often considered operational, such as the engineering decisions that relate to the specifics of the construction of a facility.

Agencies should be cautioned therefore that Washington Courts would likely find that the adoption of an overall design policy would be discretionary, but that individual decisions applying such a policy that resulted in less safety than an alternative design could be viewed by a jury as an "operational" decision.

An example is the Stewart case concerning the lighting on the freeway bridge north of Everett. This case is typical of Washington court decisions which refuse to apply discretionary immunity to the engineering decisions concerning the design of a facility. Another case is a 1983 case, Miotke v. Spokane, concerning engineering decisions made in the improvement of Spokane sewage treatment.

It could also be argued that it is not necessarily the level of decision maker, but rather the type of decision being made and whether this function was a balancing of policy considerations regardless of the level of the decision maker. Design engineers for instance will be urged in their consideration to balance and optimize the tradeoffs between the societal, economic, environmental, historic, safety and mobility impacts of many of their decisions in the overall design of a project. It is strongly urged that when these considerations are contemplated that the decision process be documented (including discussion and debate) and that this information be retained for any future civil and design related actions.

VI-1-3-5 Documentation

Many design engineers shy away from varying from standards, in part because the mere fact of doing so often incurs liability to an agency. Design manuals have the effect of policy for the agencies that use them and in many cases, the following of standards allows the engineer the cover of "discretionary immunity." But, there are considerations that the courts might find to be beneficial in decision-making. In a case heard by the State of Washington Supreme Court it was argued by the State that the design should fall under the discretionary immunity doctrine. The case was Stewart v. State in which the court ruled:

There was no showing by the State that it considered the risks and advantages of these particular designs, that they were consciously balanced against alternatives, taking into account safety, economics, adopted standards, recognized engineering and whatever else was appropriate.

Clearly then, documentation of design is important (see Chapter II-4), particularly in deviating from adopted standards. In states other than Washington, courts have found that documentation in which tradeoffs were discussed in the deviation reports qualified as a discretionary function. Hence "discretionary immunity" could be argued, provided that these deviations provide the necessary discussion of tradeoffs between multiple policy issues, different options and considerations, and the benefits and costs associated with each of those alternatives. Most notably would be the discussion of safety. When presented to a council or commission for

further policy making discussion these debates and documentation could also strengthen the "discretionary defense" argument. Deviations that result in a measurable degradation of overall safety when compared to existing conditions should not be considered. To increase the usefulness of the documents describing the deviations, it is wise to show what mitigation measures have been considered and implemented where appropriate.

Clearly the best defense in supporting oneself in court is the presentation of written evidence. The documentation is best prepared as part of the design and provides a rational for decision-making. It explains why certain criteria were not met given the circumstances and environment of the project. NCHRP 480, the Washington State *Local Agency Guidelines* and the WSDOT *Design Manual* all provide examples for documentation of such decisions and considerations.

VI-1-3-6 Ministerial Decisions

Ministerial functions are generally defined tasks, which offer little decision-making opportunity and do not require a decision among alternatives prior to completing the task or action.

In Washington State engineering decisions are considered to be ministerial decisions. The mere fact that standards are varied from constitutes a deviation from adopted policy and is considered an issue of fact.

VI-1-4 Conclusions

The final decision for roadway and highway design is left to the professional engineer whose stamp is required for the project. The engineer is required to approve the designs consistent with sound engineering practice. Political and public pressure to adopt flexible designs will undoubtedly occur and must be dealt with according to the engineer's best judgment and training.

Engineers must take the time to clearly articulate safety issues and liability concerns to the public, planners, and advocates unfamiliar with engineering design principles, and the court systems. These discussions are clear and important responsibilities of the designer.

When the principles of flexibility in design are incorporated into a project they must ultimately result in a safe facility. Designer who rely on anecdotal evidence of engineering impacts needs to understand that their decisions are at legal risk. Decisions based on well-recognized and documented engineering principles and practices are the best way to reduce this risk.

In essence context sensitive design will likely also mean increased liability to agencies, cities and counties, unless standards allow for this flexibility implicitly and they are consistent with nationally excepted policy.

Clearly, the higher the level of decision making the more probable the policy will meet the test set forth in Adna v. State. When lower level operational decisions are required they should be documented and retained.

The documentation should discuss the decisions and the alternatives considered and should be retained for future reference.

VI-1-5 Governing Regulations and Directional Documents

Actions and Claims Against State, Revised Code of Washington (RCW) 4.92.

Civil Procedure, Title 4 RCW.

Contributory Fault – Effect -- Imputation -- Contribution -- Settlement Agreements, RCW 4.22.

Design Manual, WSDOT, M 22-01.

Local Agency Guidelines, WSDOT, M 36-63.

State Environmental Policy Act (SEPA*),* RCW 43.21C, WAC 197-11, WAC 468-12.

State Government – Executive, Title 43 RCW.

VI-1-6 Additional Resources

Black's Law Dictionary, West Publishing CO., St. Paul, MN, 7th ed., 1999.

Evangelical United Brethren Church of Adna v. State - 67 Wn.2d 246, 407 P.2d 440, 445 (1965).

Glennon, John C., *Roadway Defects and Tort Liability,* Lawyers & Judges Publishing Company, Inc., Tucson, AZ, 1996.

Miotke v. Spokane – 101 Wn.2d 307, 678 P.2d 803 (1984).

Neuman, Schwartz, Clark and Bednar, *A Guide to Best Practices for Achieving Context Sensitive Solutions,* NCHRP Report #480, Transportation Research Board, Washington, D.C., 2002, p. 50.

Neuman, Timothy R., and James B. Saag, *A Guide to Applying AASHTO Policies to Achieve Flexibility in Highway Design,* NCHRP Project 20-7/Task 169, Washington, D.C., 2003.

Stewart v. State - 92 Wn.2d 285, 597 P.2d 101 (1979).